THE HONORABLE THOMAS S. ZILLY

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

FRANK "JOE" MENDEZ, an individual, on behalf of himself and others similarly situated; DONALD MAX KIMBALL, an individual, on behalf of himself and others similarly situated; and SIA GOULD, an individual, on behalf of herself and others similarly situated,

Plaintiffs,

vs.

STEELSCAPE WASHINGTON, LLC, a Washington limited liability company; and STEELSCAPE, LLC, a foreign limited liability company,

Defendants.

NO. 3:19-cv-05691-TSZ

PLAINTIFFS' MOTION FOR APPROVAL OF ATTORNEYS' FEES, CASE COSTS, AND ENHANCEMENT AWARDS

NOTE ON MOTION CALENDAR:
January 5, 2022

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

TABLE OF CONTENTS

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

TABLE OF AUTHORITIES

Cases Page

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

Other Authorities

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiffs Frank "Joe" Mendez, Donald Max Kimball, and Sia Gould, individually and on behalf of the Settlement Class preliminarily approved by this Court (hereinafter collectively referred to as "Plaintiffs") hereby move for the approval of Plaintiffs' attorneys' fees, reimbursement of case costs, and individual enhancement awards for the named plaintiffs.

On October 12, 2021, the Court issued an Order Granting Preliminary Approval of Class Action Settlement pursuant to a settlement agreement between Plaintiffs and Defendants. Dkt. 36. As agreed, this settlement provided for a Gross Settlement Amount[1] of $4,000,000, which is intended to compensate the eligible members of the Settlement Class with an individualized and proportional amount of bonus compensation recovered through this litigation. Dkt. 33, Ex. 1. The Court's Order also required that Plaintiffs submit a motion for approval attorneys' fees and case expenses not later than 30 calendar days prior to the Deadline for Written Objections, and before the Final Approval Hearing.[2] Dkt. 36, ¶ 20. Plaintiffs now request that this Court approve attorneys' fees in the amount of $1,000,000, or 25% of the gross settlement, and reimbursement of Plaintiffs' out-of-pocket costs in the amount of $9,378.99. Plaintiffs also respectfully request that this Court authorize an Enhancement Award of $5,000 each to Plaintiffs Donald Max Kimball and Sia Gould. Dkt. 33, Ex. 1, ¶ 9.

II. APPROVAL OF ATTORNEYS' FEES IS APPROPRIATE

This Court preliminarily approved a class action settlement that provides a Gross Settlement Amount of $4,000,000. Dkt. #33, Ex. 1, ¶ 5; Dkt. #36. This sum is subject to a reduction ("Opt Out Adjustment") for any individuals who choose to opt out of this

[1] Plaintiffs will use capitalized terms as they are used by the parties in their Settlement Agreement. Dkt. 33, Ex. 1.

[2] Plaintiff are currently unaware of the total expense for the Settlement Administrator's services, which will be known and presented to the Court at the time of Final Approval.

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600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

settlement. *Id*. Presently, the Settlement Administrator indicates that no member of the Settlement Class has opted out and, therefore, the potential for reduction of the Gross Settlement Amount appears unlikely. *See Declaration of Jonathan P. Shaffer Regarding Notice and Settlement Administration* (*"Shaffer Decl."*), at p. 4. Plaintiffs respectfully request that the Court approve attorneys' fees in the amount of $1,000,000, which is an award equal to 25% of the Gross Settlement Amount. Plaintiffs respectfully request approval of these attorneys' fees to compensate Class Counsel for the time and resources they have expended during the last 2.5 years while this case has been pending. In addition to approval of attorneys' fees, Plaintiffs further request the Court approve the reimbursement of their out-of-pocket expenditures for case expenses in the amount of $9,378.99.[3]

A. Plaintiffs Dedicated Significant Time and Effort to Achieve this Outcome.

Plaintiff Frank "Joe" Mendez first filed a Complaint in Cowlitz County Superior Court on July 3, 2019, which specified claims for unpaid bonus compensation in this proposed class action. Plaintiff Mendez brought claims under Washington law for Defendant's failure to pay wages in the form of bonus compensation, breach of contract, breach of the duty of good faith and fair dealing, promissory estoppel, and unjust enrichment. Dkt. 1-2. Defendants thereafter removed this action to the United States District Court for the Western District of Washington on July 29, 2019. Dkt. 1. This Court granted leave to file an Amended Complaint on January 27, 2020. Dkt. 17. On January 29, 2020, Plaintiffs filed an Amended Complaint adding Donald Max Kimball and Sia Gould as individual Plaintiffs and as representatives for the proposed class of similarly

[3] The Settlement Administrator estimates approximately $10,000 in additional costs, which are compensable pursuant to the parties' Settlement Agreement. *See*, Dkt. 33, Ex. 1, ¶ 7; *see also*, Declaration of Shaffer at p.4. As a result, the Settlement Administrator and Plaintiffs will know with certainty at the time of final approval the amount expended for settlement administration services and reimbursement of these expenses will be sought at that time.

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600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

situated employees. Dkt. 18. Defendants filed their Answer to the Amended Complaint on February 12, 2020. Dkt. 19.

This case required Plaintiffs to seek discovery in support of their claims. Plaintiffs also actively participated in extensive settlement negotiations to achieve this result for the Settlement Class. The parties, by agreement through their respective counsels, agreed to mediate this case. Prior to this mediation, Defendants produced company policies, acknowledgments by employees who received the company handbook, emails referencing the performance bonus plan(s), anonymized data detailing bonus pay-outs and percentages of gross income for eligible production workers, the policy language for the bonus plans, and presentation materials published by Defendants when advising the eligible employees of the performance bonus plans. Plaintiffs and their counsel relied upon the documents produced by Defendants when formulating their negotiation position at mediation.

On September 11, 2020, the parties participated in a lengthy mediation session with Mediator Teresa Wakeen, a credentialed, respected mediator with substantial experience as a neutral on cases involving federal and state claims in Washington, including class action cases. The parties participated in this mediation via Zoom videoconference technology due to the ongoing restrictions related to the COVID-19 pandemic. This mediation process lasted over 15 hours, but the case did not resolve immediately. Due to the complexity of issues involved in this case settlement, the parties continued negotiating beyond this initial mediation. Between September 12, 2020, and May 31, 2021, counsel for the parties continued to negotiate resolution of this case, as well as the terms of settlement. Mediator Teresa Wakeen continued to assist the parties and serve as mediator until the parties arrived upon mutually agreed, reliable terms of settlement. Following extensive negotiations related to the terms of settlement and the construction of the Settlement Agreement, the parties fully ratified their intention to resolve this matter on June 18, 2021. At all times related to this negotiation process, Plaintiffs Gould, Kimball and Mendez

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600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

participated fully in the settlement discussions and were at all times fully engaged with their counsel in the resolution of this case.

After the mediation session and extensive negotiations referenced above, Plaintiffs signed a Settlement Agreement on behalf of themselves and on behalf of the presumptive class of similarly situated bonus-eligible production workers. Dkt. 33, Ex. 1. On October 7, 2021, the parties filed a Joint Status Report and supplemental briefing in support of this settlement. Dkt. 35. Shortly thereafter, on October 12, 2021, this Court issued an Order Granting Preliminary Approval of Class Action Settlement. Dkt. 36.

B. The Settlement Provides Substantial Relief for the Class

Pursuant to the terms of the Settlement Agreement, Defendants agreed to establish a settlement fund in the amount of $4,000,000, which is subject to a proportional reduction for any eligible participants who choose to opt out of this settlement opportunity. Dkt. 33, Ex. 1, ¶ 5. As noted in the *Shaffer Decl*., no one has opted out of the settlement to date. *Shaffer Decl*., at p. 4. Therefore, it appears unlikely that the settlement fund will be reduced below the $4,000,000 Gross Settlement Amount. *Id.* Subject to the Court's approval, the Gross Settlement Amount shall be used to pay the expenses related to settlement administration, incentive awards for Plaintiffs Sia Gould and Donald Max Kimball, payment of Plaintiffs' attorneys' fees, and reimbursement of litigation costs and expenses incurred. *Id*., Ex. 1, ¶¶ 6-7, 9. All remaining funds shall then be distributed to the Settlement Class based on each participating individual's calculated proportional share of the Net Settlement Amount, less authorized payroll taxes and withholdings. *Id*., Ex. 1, ¶¶ 8, 10.b. The amount of each payment to members of the Settlement Class shall be an individualized and proportional calculation based upon the aggregate gross bonus amount actually paid to each person for the agreed bonus periods. *Id*. Given the size of the class at issue in this case, this settlement fund will provide a substantial and justifiable recovery for many members of the Settlement Class. The parties provided to the Court an estimated

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600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

average gross payout of more than $18,000 per individual, although the actual recovery may be higher or lower for each person depending on the individual's proportional earnings during a particular bonus period. Dkt. 35, p. 3. For example, some individuals may have been employed for only a short time during a particular bonus year, which impacts the individual's proportional share when compared to colleagues who worked many hours during the years applicable to this settlement.

Irrespective of the size of any individual recovery, there is no doubt that this settlement will greatly benefit the Class Members, who will receive an above-average settlement for cases like this, both in Washington and nationwide. *See, e.g., Cervantez v. Celestica Corp.*, Case No. EDCV 07-729-VAP, 2010 WL 2712267, *2-3 (C.D. Cal. July 6, 2010) (order granting preliminary approval of $2,500,000 wage and hour class action for two groups of employees identified as the Security Line Class and a Meal and Rest Period Class); *Bellinghausen v. Tractor Supply Company*, 306 F.R.D. 245, 251-52 (N.D. Cal. 2015) (approval of $1,000,000 settlement for wage and hour claims by class of retail store clerks); *Romero v. Producers Dairy Foods, Inc.*, Case No. 05-cv-0484 DLB, 2007 WL 3492841, *1-2 (E.D. Cal. November 14, 2007) (approval of wage and hour settlement of $240,000 to a class of Route Sales Drivers and Relief Drivers); *Millan v. Cascade Water Services, Inc.*, Case No. 12-cv-01821-AWI-EPG, 2016 WL 3077710, *1 (E.D. Cal May 13, 2016) (approval of $150,000 settlement in FLSA collective action by approximately 44 maintenance technicians); *Hill v. Garda CL Northwest, Inc.*, 191 Wn.2d 553, 573-76, 424 P.3d 207 (2018) (approval and remand of decision in favor of more than $7,000,000 in damages for class of approximately 500 armored vehicle employees on wage and hour claims).

C. Application of the Percentage-of-the-Fund Method is Warranted.

Federal courts acknowledge that Class Counsel have an equitable right to be compensated from a common fund that benefits Plaintiffs and unnamed class members,

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

especially when it is Class Counsel whose efforts largely procured that common fund. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (the Supreme Court "has recognized consistently that a litigant or lawyer who recovers a common fund . . . is entitled to a reasonable attorney's fee from the fund as a whole"); *Central R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885); *Stanton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003); *In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994) ("those who benefit in the creation of the fund should share the wealth with the lawyers whose skill and effort help create it"); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1977) ("[A] private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees.").

The common fund doctrine rests on the understanding that attorneys should normally be paid by their clients. *See, Boeing*, 44 U.S. at 478. Where the attorneys and unnamed class member clients have no express retainer agreement, those who benefit from the fund without contributing to it would be unjustly enriched if the attorneys' fees were not paid out of the common fund. *See, id.*; *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1046 (N.D. Cal. 2007). When clients do not pay an ongoing hourly fee to their counsel, they typically negotiate an agreement in which counsel's fee is based upon a percentage of any recovery. The percentage-of-the-fund approach mirrors this aspect of the market and thereby reflects the fee that would have been negotiated by the class members in advance, had such negotiations been feasible, given the prospective uncertainties and anticipated risks and burdens of the litigation. *See, e.g., Paul, Johnson, Alston & Hunt v. Graulty*, 886 F.2d 268, 271 (9th Cir. 1989) ("[I]t is well settled that the lawyer who creates a common fund is allowed an extra reward, beyond that which he has arranged with his client, so that he might share the wealth of those upon whom he has conferred a benefit."); *Sutton v. Bernard*, 504 F.3d 688, 692 (7th Cir. 2007) ("In deciding

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600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

fee levels in common fund cases, we have consistently directed district courts to 'do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time.'"); *cf. Missouri v. Jenkins by Agyei*, 491 U.S. 274, 285 (1989) (market factors should be considered in evaluating reasonableness).

For these reasons, the percentage-of-the-fund method is overwhelmingly preferred by courts. Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 Journal of Empirical Legal Studies, 248-281 (June 2010). An empirical study based on eighteen years of published opinions on settlements in 689 common fund class action and shareholder derivative settlements in both state and federal courts found that: (1) 83 percent of cases employed the percentage-of-the recovery method, and (2) the number of courts employing the lodestar method has declined over time, from 13.6 percent from 1993-2002 to 9.6 percent from 2003 to 2008. *Id.*, at 267-69; *accord* Fitzpatrick, Brian T., An Empirical Study of Class Action Settlements and Their Fee Awards, 7 Journal of Empirical Legal Studies, 24 (July 2010) (finding, in a similar empirical study of 688 settlements approved by federal district courts during 2006 and 2007, that 69 percent of courts employed the percentage-of-the-settlement method, 12 percent employed the lodestar method, and 20 percent did not report which method they used).

In the case at bar, the Court preliminarily approved the parties' settlement, which establishes a common settlement fund of $4,000,000. Dkt. 36. Because the Settlement Class has not paid Class Counsel for their efforts, equity requires that a fair and reasonable fee be paid, based on what the market would traditionally require, no less than if they had hired private counsel to litigate their cases individually. *Boeing*, 444 U.S. at 479-81.

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600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

D. Percentage-of-the-Fund Analysis Supports Counsels' Fee Request.

1. The Fees Requested – 25% of the Gross Settlement Fund – Are Less than the Amount Fees Awarded in Similar Class Actions.

An oft-cited empirical study of attorneys' fees in common fund cases found that awards averaged 32% of the fund and 34.74% when expenses are added in. *See* Silber and Goodrich, *Common Funds and Common Problems Fee Objections and Class Counsel's Response*, 17 Rev. Litig. 525, 545 (1998) (cited in *Craft v. County of San Bernardino*, 624 F.Supp.2d 1113, 1123-25 (C.D. Cal. 2008)). Silber and Goodrich recommend a 33% fee award and say that this is appropriate because "the attorneys will receive the best fee when the attorneys obtain the best recovery for the class. Hence, under the percentage approach, the class members and the class counsel have the same interest – maximizing the recovery of the class." *Id*. at 534.

In the Ninth Circuit, the typical range of acceptable attorneys' fees in class action cases is 20% to 33.3% of the total settlement value, with 25% widely viewed as the "benchmark." *See, Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Paul, Johnson, Alston* & *Hunt* v. *Graulty*, 886 F.2d 268,272 (9th Cir. 1989). Although it might be viewed as a standard fee award, courts frequently award fees greater than this recognized benchmark. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049-50; *In re Mega Fin. Corp. Sec. Litig.*, 213 F 3d 454,460 (9th Cir. 2000); *Bond* v. *Ferguson Enterprises, Inc.*, Case No. 09-cv-1662 OWW MJS, 2011 WL 2648879, *9-11 (E.D. Cal. June 30, 2011) ("[T]he exact percentage varies depending on the facts of the case, and in 'most common fund cases, the award exceeds that benchmark.'") (citation omitted); *see also In re Activision Sec. Litig.*, 723 F.Supp. 1373, 1377-78 (N.D. Cal. 1989) ("nearly all common fund awards range around 30%").

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600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

Courts in the Ninth Circuit frequently award a percentage of the fund that is higher than the 25% benchmark. *See, In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1046 (N.D. Cal. 2008). In fact, the fee award exceeds the 25% benchmark in *most* common fund cases. *See Lopez v. Youngblood*, Case No. CV-F-07-0474 DLB, 2011 WL 10483569, *5 (E.D. Cal. Sept. 2, 2011) (fees in common fund cases average 32% or 34.74%); *Omnivision* at 1047 ("This court's review of recent reported cases discloses that nearly all common fund awards range around 30%"); *In re Pacific Enterprises Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (affirming fee award equal to 33% of fund); *Romero v. Producers Dairy Foods, Inc.*, Case No. 05-cv-0484 DLB, 2007 WL 3492841, *4 ("Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." (citing 4 Newberg, NEWBERG ON CLASS ACTIONS § 14.6 (4th ed. 2007)); *In re Mego*, 213 F.3d 457, 463 (9th Cir. 2000) (affirming award of 33% of common fund); *Vandervort v. Balboa Capital Corp.*, 8 F.Supp.3d 1200, 1210 (C.D. Cal. 2014) (awarding 33% of fund in TCPA class action); *Hageman v. AT&T Mobility LLC*, No. CV 13-50-BLG-RWA, 2015 WL 9855925, *3-4 (D. Mont. Feb. 11, 2015) (common fund fee assessment for Class Counsel is approved in the amount of 33% or $15 million, from the common fund of $45 million obtained for the Class).

Here, Plaintiffs request attorneys' fees equal to the 25% "benchmark" applied in the Ninth Circuit and, regardless of the substantial results for the Settlement Class, the Class Counsel does not request any upward adjustment from this amount. *See generally*, *Declaration of Donald W. Heyrich* (*"Heyrich Decl."*). Class Counsel respectfully submits that their fee request is supported by the quality and amount of work performed on behalf of the Settlement Class, and the outstanding settlement that will result in substantial additional income to the members of the Settlement Class, depending on the proportional award assigned to each eligible participant in this action. The request also is well within

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

the range of reasonable attorneys' fees awarded in similar wage and hour class actions. *Bellinghausen v. Tractor Supply Company*, 306 F.R.D. 245, 260-61 (N.D. Cal. 2015); *Romero v. Producers Dairy Foods, Inc.*, Case No. 05-cv-0484 DLB, 2007 WL 3492841, *3 (E.D. Cal. November 14, 2007) (approving 33.3% fee award due to uniqueness of legal issues and effort by plaintiff's firm); *Cervantez v. Celestica Corp.*, Case No. EDCV 07-729-VAP, 2010 WL 11465133, *6 (C.D. Cal. October 29, 2010) (Ninth Circuit benchmark of 25% fee award is presumptively reasonable); *Millan v. Cascade Water Svcs., Inc.*, Case No. 12-cv-01821-AWI-EPG, 2016 WL 3077710, *11-12 (E.D. Cal May 13, 2016) (approving 33% fee award above benchmark based on exceptional results for the class).

2. Lodestar Cross-Check Confirms Reasonableness of Fee Award.

While it is not strictly required, many district courts will conduct a lodestar cross-check to ensure that the requested fee is reasonable. *Millan v. Cascade Water Svcs., Inc.*, Case No. 12-cv-01821-AWI-EPG, 2016 WL 3077710, *11 (E.D. Cal May 13, 2016). A basic lodestar cross-check multiplies the number of hours counsel reasonably expended on the litigation by a reasonable hourly rate. *See, Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (overruled on other grounds by *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011)). When calculating a lodestar award as a "cross-check" for an award based on a percentage-of-the-fund, courts generally look to prevailing market rates for comparable work in the district in which the court sits to determine a reasonable hourly rate. *See, e.g., Camacho v. Bridgeport Fin. Servs*., 523 F.3d 973, 979 (9th Cir. 2008). The legal community where the district court is situated is deemed most relevant for this analysis. *See, e.g., Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997).

Over the period of approximately 2.5 years, Class Counsel expended over 354 hours of attorney time on this case. *Heyrich Decl.*, ¶ 3. These hours are reasonable if for no other reason than that Class Counsel knew it was possible that they would never be paid for this substantial amount of work. Simply put, Class Counsel had no incentive to act in a

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

manner that was anything but economical. *See, Moreno v. City of Sacramento,* 534 F.3d 1106, 1112 (9th Cir. 2008) ("[L]awyers are not likely to spend unnecessary time on contingency cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee."). That said, counsel took their responsibility seriously and endeavored to represent the interests of their clients and the Settlement Class to the greatest extent possible.

The attorney hourly rates applied for the loadstar cross-check range from $490 to $685 per hour. *Heyrich Decl*., ¶¶ 5-8. These rates are consistent with rates applied to Class Counsels' legal time in other cases, and are consistent with rates applied in class action cases in the Western District of Washington. *See, id.* (setting forth Class Counsels' approved rates in other cases); *see also Joseph v. TrueBlue, Inc.*, Case No. 3:14-cv-05963-BHS (applying a rate of $725 per hour to an attorney with experience equivalent to that of Class Counsel in this case, and applying rates overall ranging from $425 to $725); *Pelletz v. Weyerhaeuser Co.,* 592 F. Supp. 2d 1322, 1326 (W.D. Wash. 2009) (approving hourly rates for work performed in Seattle that ranged from $415 to $760 per hour as part of 2,407.4 total hours spent over the course of litigation spanning about 1 1/2 years); *Palmer v. Spring Solutions, Inc.*, C9-1211 JLR, Dkt. No. 90 (W.D. Wash. Oct. 21, 2011) (granting motion for attorney fees as percentage of common fund where rates of Seattle attorneys ranged from $650 to $760 per hour for a case litigated about two years), *affirmed by* 508 Fed.Appx. 658 (9th Cir. 2013); *Global Educ. Svcs. v. Intuit, Inc*., No. C09-944 RSL (W.D. Wash. 2011) (approving hourly rates of $760 and $650 following a reasonableness review); *Gardner v. Capital Options, LLC et al*., No. C07-1918 (W.D. Wash. 2009) (approving hourly rates of $760 and $500 following a reasonableness review); *Zwicker v. Gen. Motors Corp.*, No. C07-0291 JCC (W.D. Wash. 2008) (approving hourly rates up to $650); *Dell v. Carideo,* No. C06-1772 JLR (W.D. Wash. 2010) (approving plaintiffs' fee request at comparable rates to those sought here); *Khadera v. ABM Indus., Inc*., C08-0417

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600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

RSM (W.D. Wash. Oct. 2012) (same); *Arthur v. Sallie Mae, Inc.*, C10-00198 JLR (W.D. Wash. Sept. 2012) (same).

Multiplying the reasonable hours worked by class counsel by the reasonable hourly rates establishes a base lodestar attorneys' fee award in this case in the amount of $191,455. This combined loadstar would result in a multiplier of approximately 5.1, which is well within the range of 0.6 to 19.6. multipliers approved by courts when awarding attorneys' fees as a percentage of the common fund. *See, Baker v. Navient Solutions, LLC.*, Case No. 1:17-cv-1160 (LMB/JFA) (E.D. Va. Feb. 8, 2019) (TCPA case awarding fees equal to 33.33% of the common fund, which was 2 times the loadstar); *Joseph v. TrueBlue, Inc*., Case 3:14-cv-05963-BHS, Dkt. #131 and Dkt. #132, p. 8 (W.D. Wash. Mar. 6, 2017) (TCPA case awarding fees equal to 30% of the settlement fund, which was 2.29 times the lodestar); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, at 1051 n.6 (9th Cir. 2002); *Steiner v. Am. Broad Co*., 248 Fed.Appx. 780, 783 (9th Cir. 2007) (approving 6.85 multiplier); *In re Rite Aid Corp. Sec. Litig*., 362 F. Supp. 2d 587, 589 (E.D. Pa. 2005) (approving multiplier of 6.96).

Finally, the multiplier in this case must be evaluated against the substantial results achieved by Class Counsel, the risks of representing a smaller sized class of employees on a contingent basis, and the uncertainty of outcome. When setting the fee for Class Counsel, the Court should consider: 1) the results; 2) the risk to Class Counsel; 3) secondary benefits of the settlement; 4) the market rate in the particular field of law; 5) the burdens Class Counsel experienced; and 6) whether the fee was contingent. *See, In re Optical Disk Drive Prods. Antitrust Litig.*, 959 F.3d 922, 930 (9th Cir. 2020). A proper weighting of these factors does not justify a below the "benchmark" award in this case.

Further, this is not a considered megafund wage and hour case and, as such, any reference to a windfall by way of a benchmark 25% fee award is inappropriate. *In re Optical Disk Drive*, 959 F.3d at 932 (recognizing that megafund cases typically involve

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600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

settlement exceeding $100 million, thereby elevating the importance of the lodestar analysis). For example, lodestar multipliers of 2.88 to 3.65 were deemed inherently reasonable by the Ninth Circuit. *Reyes v. Experian Info. Solutions, Inc.*, 856 Fed.Appx. 108, 111 (9th Cir. 2021). Similarly, another court reduced a multiplier to 2.0 in a case that yielded a less significant recovery per eligible class member. *Nitsch v. DreamWorks Animation SKG Inc.*, Case No. 14-CV-04062-LHK, 2017 WL 2423161, *10 (N.D. Cal. June 5, 2017). In this case, Class Counsel represented a much smaller class of production workers at a single facility, yet they garnered a better result per eligible member of the Settlement Class by comparison. Other cases have justified even higher multipliers for the results achieved here. *See, e.g., Buccellato v. AT&T Operations, Inc.*, 2011 WL 3348055, at *2 (N.D. Cal. June 30, 2011) (approving multiplier of 4.3 in case involving $12,500,000 settlement fund); *Rabin v. Concord Assets Grp., Inc.*, 1991 WL 275757, at *1 (S.D.N.Y. Dec. 19, 1991) ("The requested attorneys' fees of $2,544,122.78 represents a multiplier of 4.4. Plaintiffs' counsel asserts that 'when one considers the potential additional time plaintiffs' counsel will be required to work in this matter, the multiplier is reduced to a range of 3.7 to 3.2.'"); *Maley v. Del Glob. Techs. Corp.*, 186 F.Supp.2d 358, 360 (S.D.N.Y. 2002) (approving multiplier of 4.65 in case involving $28,000,000 settlement fund). In the end, if the Court were to award less than the "benchmark" fee in the Ninth Circuit, it would fail to properly reward Class Counsel for their ardent and efficient advocacy when achieving this excellent result, thereby creating an undesired incentive for similar counsel to unnecessarily drag out litigation to justify their fee.

3. Class Counsel Faced Substantial Risk of Non-Payment.

The Ninth Circuit recognizes that the public interest is served by rewarding attorneys who take on risky contingent fee representation, as well as the need to compensate those attorneys for assuming the risk that they may be paid nothing for their work. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299 (9th Cir. 1994)

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600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

("Contingent fees that may far exceed the market value of the services if rendered on a noncontingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis regardless of whether they win or lose."); *Vizcaino*, 290 F.3d at 1051 (courts reward successful class counsel in contingency cases "for taking the risk of nonpayment by paying them a premium over their normal hourly rates.").

While the settlement before this Court is indeed substantial, this outcome was by no means guaranteed. Defendants vigorously denied liability on all claims. Plaintiffs faced the uphill battle of proving liability and damages for the unpaid bonus income based on an actual or implied contractual theory of liability for wages owed. Additionally, Plaintiffs also faced a hurdle of certifying the presumptive class and eventually prevailing on their claims. *See*, Dkt. 32, pp. 13-17. Plaintiffs also took on the challenge of litigating against Defendants, which are part of a sizeable, multi-national corporation represented by experienced counsel from a large, respected defense firm. On the other hand, HKM Employment Attorneys LLP is a smaller plaintiff's firm with a focus on representing workers. Firms of smaller stature face even greater risks when litigating large class actions with no guarantee of payment. *Boyd v. Bank of Am. Corp.*, Case No. SACV 13-0561-DOC, 2014 WL 6473804, *8-10 (C.D. Cal. Nov. 18, 2014) (awarding 33% rather than the 25% benchmark, finding heightened risk of small firm representation should be awarded with larger percentage fee for a good result); *see also, Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air*, 483 U.S. 711, 750 (1987) (Delaware Valley II) (plurality opinion) ("[C]ontingent litigation may pose great risks to a small firm or a solo practitioner because of the risk of nonpayment may not be offset so easily by the presence of paying work . . ."); *Davis v. Mutual Life Ins. Co.*, 6 F.3d 367, 382 (6th Cir. 1983) ("[T]he maintenance of comparatively large pieces of litigation preens small firms from diversifying risk by taking on additional clients . . .").

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

Class Counsel prosecuted this matter on a purely contingent fee basis, agreeing to advance all necessary expenses and to receive a fee only if Plaintiffs were able to realize a recovery. Class Counsel have invested considerable time and money prosecuting this action on behalf of very deserving clients. Class Counsels' outlay of their time, opportunity costs, and money, all with the risk that none of it would be recovered, supports the fees requested here. *Omnivision*, 559 F.Supp.2d at 1047.

E. The Payment of Costs is Fair and Reasonable.

Class Counsel who assisted clients and helped to create a common fund are entitled to the litigation expenses they incurred in prosecuting the case, "so that the burden is spread proportionally among those who have benefitted." *Stanton*, 327 F.3d at 969-70 (quoting *Van Gemert*, 444 U.S. at 478); *see also, In re Media Vision Tech. Sec. Litig*., 913 F.Supp. 1362, 1366 (N.D. Call. 1996) ("Reasonable costs and expenses incurred by an attorney who creates or preserves a common fund are reimbursed proportionally by those class members who benefit from the settlement.").

Here, Plaintiffs seek reimbursement of the actual litigation costs expenses incurred in the amount of $9,378.99. Plaintiffs incurred these out-of-pocket expenses without any assurance they would ever be repaid. These expenses were justified and necessary to prosecute these claims and secure the resolution in this litigation, and Plaintiffs should be permitted to recoup these costs from the settlement fund. *See, In re Immune Response Sec. Litig.*, 497 F.Supp.2d 1166, 1177-78 (S.D. Cal. 2007) (finding that costs such as filing fees, photocopy costs, travel expenses, postage, computerized legal research fees, and mediation expenses are relevant and necessary expenses in class action litigation).

III. ENHANCEMENT AWARDS SHOULD BE APPROVED

As agreed to by the parties, and subject to the Court's final approval, Plaintiffs Sia Gould and Donald Max Kimball should receive Enhancement Awards of $5,000 each.

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

Dkt. 33, Ex. 1, ¶ 9.[4] Enhancement awards are generally recognized as payments of money to class representatives to compensate class representatives for work done on behalf of the class, to offset any financial or reputational risk undertaken in bringing the action, or to acknowledge their willingness to act as a private attorney general. Such awards are generally sought after a settlement or verdict has been achieved. *See, Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009); *Hartless v. Clorox Co.*, 273 F.R.D. 630, 646-47 (S.D. Cal. 2011) ("Incentive awards are fairly typical in class actions."). Service awards became "routine" around the turn of the century. *See,* Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1311 (2006) (a survey of settled class actions between 1993 and 2002). Today, "[i]ncentive awards are fairly typical in class action cases." *Rodriguez,* 563 F.3d at 958.

Historically, enhancement awards approved by the Ninth Circuit and by this Court typically range between $5,000 and $40,000. *See, In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 457, 463 (9th Cir. 2000) (approving incentive awards of $5,000); *Pelletz v. Weyerhaeuser Co.*, 592 F.Supp.2d 1322, 1329-30 (W.D. Wash. 2009) (approving awards of $7,500); *Hughes v. Microsoft Corp.*, C98-1646C, 93-0178C, 2001 WL 34089697, *12-13 (W.D. Wash. Mar. 26, 2001) (approving incentive awards of $7,500, $25,000, and $40,000).

Courts also recognize that approving enhancement awards can encourage future class representatives to step forward to represent the interests of other classes. *See, Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit."). Thus, an appropriate award will encourage others

[4] The parties negotiated these Enhancement Awards as part of their Settlement Agreement, subject to approval by this Court. Dkt. 33, Ex. 1, ¶ 9. Plaintiff Frank "Joe" Mendez declined the opportunity to receive an Enhancement Award.

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

to step forward to help provide justice to classes of people who cannot obtain justice individually.

In this case, Plaintiffs Sia Gould and Donald Max Kimball, both active employees working for Defendants, were added to this action to advance the interests of the putative class. Their time and dedication as class representatives proved essential to obtaining the relief provided for the Settlement Class. Their efforts and the accompanying risks should be recognized and rewarded. Plaintiffs Kimball and Gould respectfully request that the Court approve an enhancement award of $5,000 for each of them, which is reasonable in light of the facts and circumstances in this case and the prevailing standards in the Ninth Circuit. *See, e.g., Wheeler v. Cobalt Mortgage, Inc.*, C14-1847-JCC (W.D. Wash. Oct. 16, 2015) (order approving service award of $10,000 to the named plaintiff); *Glass v. UBS Fin. Servs., Inc.*, C-06-4068 MMC, 2007 WL 221862, at *17 (N.D. Cal. Jan. 26, 2007), affirmed, 331 Fed.Appx. 452 (9th Cir. 2009) (order approving service award for $25,000 to the named plaintiff); Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1333 (2006) (finding the "mean within case average award" to be approximately $12,000).

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Court approve Plaintiffs' attorneys' fees in the amount of $1,000,000, reimbursement of case costs in the amount of $9,378.99, and provide Enhancement Awards of $5,000 each to Plaintiffs Sia Gould and Donald Max Kimball.

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504

RESPECTFULLY SUBMITTED this 5th day of January, 2022.

HKM EMPLOYMENT ATTORNEYS LLP

/s/ Brian L. Dolman

Donald W. Heyrich, WSBA No. 23091
Erin S. Norgaard, WSBA No. 32789
Brian L. Dolman, WSBA No. 32365
HKM Employment Attorneys LLP
600 Stewart Street, Suite 901
Seattle, WA 98101
Tel: (206) 838-2504
Email: dheyrich@hkm.com
enorgaard@hkm.com
bdolman@hkm.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2022, I caused the foregoing document to be electronically filed with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the following attorneys of record.

Patrick M. Madden
Ryan D. Redekopp
K&L Gates LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
patrick.madden@klgates.com
ryan.redekopp@klgates.com

DATED this 5th day of January, 2022.

/s/ Angela Tracy
Angela Tracy, Legal Assistant

HKM EMPLOYMENT ATTORNEYS LLP
600 Stewart Street, Suite 901
Seattle, Washington 98101
Tel: (206) 838-2504